IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Larry Washington Plaintiff, vs. Marion Tuthill, *et al*. Defendants.	Civil Action No. GLR-13-03767

MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS

Despite multiple requests for production of documents and subpoenas, defense counsel did not disclose two audiotapes until Laura Mullally played them at the end of Larry Washington's deposition, over five months after the first request. One audiotape was made the day after Larry Washington was stabbed in the eye and contained numerous important details about the case. The other audiotape contained additional details about the attack.

When the audiotapes were revealed, it was done in such a manner as to sandbag, surprise, and harass Mr. Washington and his counsel. Prior to playing the tapes, Ms. Mullally engaged in a series of questions about whether Mr. Washington had ever told internal investigators about corrupt prison guards, including at his current place of incarceration. This deposition was occurring with a prison guard in the room, who heard details of how Mr. Washington helped an investigator *at the same institution as the guard*. An inmate who is known to reveal information about corruption is at risk for physical retaliation from both inmates and staff. This basic premise of prison life should be well known to Ms. Mullally, an experienced correctional litigator. The playing of the audiotapes, which included statements by Mr. Washington revealing details about staff corruption, occurred after counsel for Mr. Washington had told Ms. Mullally about Mr. Washington's concerns.

FACTUAL BACKGROUND

The defendants in this case, all individuals, are represented by lawyers in the Maryland Office of the Attorney General, Laura Mullally and Merrilyn Ratliff. Defense counsel also represents the Department of Public Safety and Correctional Services (the "Department"), which holds relevant documents in this matter. On June 13, 2016, Ms. Mullally agreed to accept service of subpoenas for the Department.

On June 21, 2016, Ms. Mullally was served Requests for Production of Documents for defendants Ffolkes, Moore, Porter, and Tuthill. Requests for Production of Documents were sent to Defendant Beverly (who was still *pro se*) by certified mail that same day.[1] These requests were the same except for the names of the parties. The unanswered Request to Defendant Beverly was resent on September 8, 2016 to defense counsel. Those Requests, which were based on the Standard Requests for Production of Documents in the Local Rules, define "document" according to Fed. R. Civ. P. 34(a)(1)(A), which includes "sound recordings." Defendants' own Requests also incorporate the definitions in the Standard Requests. Plaintiff's Request number 2 was for "documents that you have in your possession, custody or control that you may use to support your defenses." Request number 3 was for "documents … which relate to, describe, summarize, or memorialize any communications concerning the attacks on Larry Washington." Request 4 was for "all documents relating to the allegations set forth in the complaint." Several other requests would also have encompassed the audiotapes. The Request to defendant Tuthill is attached as Exhibit 1.

[1] Defendants Beverly and Miles were not immediately represented by the Office of the Attorney General, and were *pro se* until the Office agreed to represent them on September 6, 2016. *See* ECF No. 74, 75, and 83.

On June 22, 2016, the Department was served with a subpoena through Ms. Mullally. The instructions in the subpoena also defined "document" according to Fed. R. Civ. P. 34(a)(1)(A). The first item was for "all documents related to the two alleged attacks on Larry Washington, including … IIU records…" The audiotapes were generated by the Internal Investigations Unit, and fell squarely within the subpoena's request. This subpoena is attached as exhibit 2.

On September 8, 2016, a Request for Production of Documents was served on Shavella Miles through defense counsel. This Request, consistent with earlier requests, included sound recordings within the definition of documents. It also included numerous requests that would encompass the audio recordings. This request is attached as exhibit 3.

On November 14, 2016, another subpoena was served on the Department through defense counsel, which explicitly asked for "all audio, photographic, or video recordings related to the two attacks." This subpoena is attached as exhibit 4.

To date, only two batches of documents have been provided by defense counsel. It is unclear what documents respond to the Requests for Production, and which documents are responsive to the subpoenas. On September 22, the first set of documents was received with only a cover letter signed by Ms. Ratliff. There was nothing to indicate which documents are responsive to the requests for production of documents and which documents may be in response to a subpoena. On November 4, a second box of documents was received, which included Defendant Marion Tuthill's Response to Plaintiff Larry Washington's Request for Production of Documents. The box also included documents from Shavella Miles' personnel file, which were responsive to the subpoena, not the RFP.

While it is unknown when defense counsel obtained the audiotapes, it happened far enough in advance that defense counsel was able to bring a cassette player into the prison—a process that typically requires advance approval by the warden.

During the deposition of Larry Washington, Mr. Washington was in handcuffs for the entire time and monitored by a prison guard in the room. Also present were defense counsel Ms. Mullally and Ms. Ratliff, and plaintiff's counsel, David Dyson. Officer Scott was the officer in the room during most of the deposition. Officer Scott's uniform was a black hooded sweatshirt with a skull image, worn with black BDU pants and combat boots. Officer Scott was more than a bystander—he was also a witness to an incident discussed during the deposition and had written Mr. Washington an infraction ticket.

Most importantly, Officer Scott is the subject of a rumor circulating within Roxbury Correctional Institution that he is corrupt and affiliated with a prison gang. Whether it is true or not is irrelevant. Mr. Washington was distraught that evidence of his cooperation with authorities was being discussed in the same room as a prison guard rumored to be corrupt. If the rumors were true, Mr. Washington was at physical risk. Regardless of the veracity of rumors, the impact on Mr. Washington's emotional state was the same.

When defense counsel presented Mr. Washington with exhibits stating that he had cooperated with an internal investigator at Roxbury Correctional Institute, Mr. Washington gave bizarre answers. With Officer Scott outside of the room, plaintiff's counsel notified defense counsel about Mr. Washington's concerns, and the line of questioning was finished while Officer Scott was temporarily outside of the room.

Later, while aware of Mr. Washington's earlier concerns about Officer Scott, and with Officer Scott in the room, Ms. Mullally surprised Mr. Washington and his counsel by pulling from her files audiocassettes ***not previously produced or disclosed in discovery*** where Mr. Washington discussed corrupt officers with a detective for the Internal Investigations Unit. Ms. Mullally agreed to delay playback until Officer Scott was replaced. However, Officer Scott later reentered the room. Playback continued, which was of a mundane photographic lineup. When the more inflammatory second tape was revealed and played in the presence of Officer Scott, Mr. Washington was too emotionally disturbed to continue with the deposition.

Copies of the two audiotapes which were played during the deposition were finally provided to Plaintiff's counsel the next day.

ARGUMENT

1. The Audio Tapes Were Improperly Withheld Prior To The Deposition and Should be Excluded

The Federal Rules of Civil Procedure permit parties in litigation to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). A party has a duty to supplement any disclosure after responding to a request for production. Fed. R. Civ. P. 26(e)(1). "The federal rules promote broad discovery so that all relevant evidence is disclosed as early as possible, making a trial 'less a game of blind man's b[l]uff and more a fair contest.'" *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993) (*quoting United States v. Procter & Gamble Co*., 356 U.S. 677, 682 (1958)).

The audiotapes were intentionally and improperly withheld from production until they could be used to surprise Mr. Washington at the end of his deposition. "The federal rules promote broad disclosure during discovery so each party can evaluate the strength of its evidence and chances of success." *Newsome v. Penske Truck Leasing Corp.*, 437 F.Supp.2d 431, 437 (D.Md. 2006). Evidence may not be withheld in order to ambush a party during a deposition.

Dehart v. Wal-Mart Stores, East, L.P., 2006 WL 83405 (W.D.Va. Jan. 6, 2006). Once the evidence is requested, it cannot be withheld for future impeachment use. *Newsome* at 437.

A party who temporarily withholds evidence to use for impeachment "does so at its own peril." *Newsome v. Penske Truck Leasing Corp.*, 437 F.Supp.2d 431, 438 (D.Md. 2006). While pure impeachment material may be withheld at times, material that is useful for impeachment and also substantive must be disclosed, but may be temporarily withheld with a court order in some cases. *See id.* at 437; *Bryant v. Trucking*, 2012 WL 162409 at *5 (D.S.C. Jan. 18, 2012) (listing cases). Pure impeachment material is unrelated to the claims or defenses of the lawsuit. *Id.* at 435. The threshold for material to be more than impeachment material is very low. *See Chiasson*, 988 F.2d at 517 (videotape of a plaintiff carrying on daily activities despite claims of pain as a result of personal injury was at least partially substantive). The audiotapes in this case, which discuss details of the events in question, go directly to the claims and defenses in the lawsuit and are therefore substantive material. Most importantly, the defendants never sought any court order to temporarily withhold production, and their withholding was therefore improper.

When evidence is discoverable and improperly withheld, the prejudiced party may move to compel production or to exclude the evidence from trial. Fed. R. Civ. P. 37(c); *Newsome* at 438; *Morris v. Metals USA*, 2011 WL 94559 (D.S.C. Jan. 11, 2011). In this case, compelling production would have no impact, since the evidence was produced the day after the deposition (after the damage had been done). The remaining sanction is for the evidence to be excluded at trial. Because the detective could still testify to the conversations on the audiotapes even if the audiotapes were excluded, any appropriate remedy should also exclude the detective's testimony about the conversations.

The only exception to sanctions is if the failure was "substantially justified" or "harmless." Fed. R. Civ. P. 37(c)(1). In this circuit, five factors guide a determination of whether a failure was substantially justified or harmless:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Southern States Rack & Fixture v. Sherwin-Williams, 318 F.3d 592 at 597 (4th Cir. 2003). There is no requirement for a "finding of bad faith or callous disregard of the discovery rules." *Id.* at 596.

In this case, the surprise factor weighs heavily for the plaintiff, who suddenly was made aware of audiotapes in the middle of a deposition, over five months after they were first requested. This disclosure, while still during the discovery period, was after expert reports were generated, strategy was developed, and occurred a day before the first deposition of a defendant. The ability to cure was substantially handicapped by the short delay before the start of depositions of defendants. Allowing the evidence at trial would be disruptive because it would require time to explain, and involve testimony about facts that are irrelevant to the case. The evidence is not of great importance in the case, since it does not change the underlying and only relevant facts of this case: (1) Mr. Washington was attacked, (2) he was placed on the same housing tier with his attacker(s), (3) he notified the guards of the danger this presented, (4) the guards did not nothing to protect him, and (5) he was brutally and viciously attacked by the same attackers, causing the loss of his eye, broken ribs, fractured spine and emotional injuries.

In addition to, or instead of, exclusion, this Court may order payment of reasonable expenses caused by the failure to produce the audiotapes, may inform the jury of the failure, and may impose other appropriate sanctions. Fed. R. Civ. P. 37(c)(1).

Additionally, this Court also has inherent authority to sanction for improper conduct in timing production, even when a statute or rule may also apply. *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1245 (9th Cir. 2016) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991)). Such a sanction requires an express finding of bad faith. *Haeger* at 1244. Such a finding would be appropriate here because the tape was played in the presence of a prison guard, knowing that doing so would cause emotional distress.

CONCLUSION

For the foregoing reasons, Plaintiff requests this court to suppress the audiotaped conversations and any other relief the court deems appropriate.

December 21, 2016
Baltimore, Maryland

Respectfully submitted,

/s/
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